Supreme Court, U.S.
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CASE NO. 96-207

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ROSA SALYER AND OTHERS SIMILARLY SITUATED,
Petitioners,

v.

OHIO BUREAU OF WORKERS' COMPENSATION
AND WES TRIMBLE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Fair Labor Standards Act the Bureau of Workers' Compensation ["Bureau"] is an "employer" of Mrs. Salyer, and caregivers such as Mrs. Salyer.

2. Whether under the Fair Labor Standards Act Mrs. Salyer and caregivers such as Mrs. Salyer, are "employees" (*i.e.* an individual who is "employed," 29 U.S.C. § 203(e)), of the Bureau of Workers' Compensation.

3. Whether the duties performed by Mrs. Salyer, fall within the definition of "companionship services" exemption to the Fair Labor Standards Act, 29 U.S.C. § 213(a) (15).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. FEDERAL COURTS LACK JURISDICTION TO HEAR THIS CASE 3

II. THERE IS NO LOWER-COURT SPLIT OF AUTHORITY ON THE ISSUES PRESENTED . . 4

III. THERE ARE NO SUBSTANTIAL QUESTIONS OF FEDERAL IMPORTANCE DUE TO THE CASE'S UNIQUE FACTS AND LIMITED APPLICABILITY TO OTHER POTENTIAL PLAINTIFFS 4

IV. THE LOWER COURTS CORRECTLY HELD THAT THE FLSA DOES NOT APPLY TO SPOUSAL CAREGIVER SERVICES 5

A. MRS. SALYER IS NOT BWC'S EMPLOYEE UNDER THE ECONOMIC REALITIES TEST 5

Page

B. THE SERVICES MRS. SALYER PROVIDES TO MR. SALYER ARE COMPANIONSHIP SERVICES AND ARE SPECIFICALLY EXCLUDED FROM COVERAGE UNDER THE FLSA 8

V. CONCLUSION 11

TABLE OF AUTHORITIES

CASES **Page**

Adams v. Kansas,
No. 94-4201-RDR (D. Kan. June 24, 1996) 3

Blow v. Kansas,
929 F. Supp 1400 (D. Kan. 1996) 3

Bonnette v. California Health & Welfare Agency,
525 F. Supp. 125 (N.D. Cal. 1981) *aff'd.*,
704 F.2d 1465 (9th Cir. 1983) 4, 5, 6, 7

Brock v. Superior Care, Inc.,
840 F. 2d 1054, 1058 (2nd Cir. 1988) 6

Close v. New York,
No. 94-CV-0906 (N.D. N.Y. August 19, 1996) . . 3

Cox v. Acme Health Services,
55 F.3d 1304 (7th Cir. 1995) 10

Goebel v. Colorado,
No. 3-K-1227 (D. Col. June 25, 1996) 3

Goldberg v. Whitaker House Corp.,
366 U.S. 28 (1961) 5

McCune v. Oregon Senior Services Division,
643 F. Supp. 1444 (D. Ore. 1986) 9, 10

Mills v. Maine,
No. 92-410-P-H (D. Me. July 3, 1996) 3

CASES Page

Moad v. Arkansas State Police Dept.
No. LR-C-94-450 (E.D. Ark. May 14, 1996) . . . 3

Port Authority Trans-Hudson v. Feeney,
495 U.S. 299, 305-07 (1990) 3

Ross v. Middle Tennessee State Univ.,
No. 3-95-1202 (M.D. Tenn. July 17, 1996) 3

Sandt v. Holden,
698 F.Supp 64 (M.D. Pa. 1988) 10

Savage v. Correlated Health Services, Ltd.,
(1992) 64 Ohio St. 42 3d, 591 N.E.2d 1216 (1992) 7

Seminole Tribe of Florida v. Florida,
116 S. Ct. 1114 (1996) 3

Stuhr v. Oregon,
No. 95-6118-TC (D. Ore. June 14, 1996) 3

Toth v. Green River Regional Mental Health/Mental Retardation Bd., Inc.,
753 F.Supp. 216 (W.D. Ky. 1989) 10

United States v. Silk,
331 U.S. 704 (1947) 6

OHIO CONSTITUTION, STATUTES, AND ADMINISTRATIVE CODE

Ohio Constitution Art. II, § 35 1

Page

Ohio Administrative Code § 4123-7-25 . . . . . 1, 2

Ohio Administrative Code § 4123-7-25(F) 2

Ohio Administrative Code 4123-7-30 (A) 7

Ohio Administrative Code §§ 4123-7-38 and 4123-7-40 7

Ohio Administrative Code § 4123-9-01 8

Ohio Revised Code § 2305.27 7

Ohio Revised Code § 4111 3

Ohio Revised Code § 4123.31 1

Ohio Revised Code § 4121.12 1

Ohio Revised Code § 4121.12.1(P) (3) 7

Ohio Revised Code § 4121.39 1

Ohio Revised Code § 4123.66(A) 1

FEDERAL RULES AND STATUTES

Sup Ct. R. 10 4

29 CFR § 552.6 . . . . . 9, 10

29 U.S.C. § 213(a)(15) 8

STATEMENT OF THE CASE

Petitioner Rosa Salyer ("Salyer") has asked the Court to review whether a spousal caregiver to an injured worker is an employee of the Respondent, Ohio Bureau of Workers' Compensation ("BWC") under the Fair Labor Standards Act ("FLSA") and therefore entitled to overtime pay and a minimum wage. Generally, Respondents agree with Petitioner's Statement of the Case. However, several points require elaboration.

BWC acts as a state funded insurance company. Pursuant to Article II, § 35, of the Ohio Constitution, a workers' compensation state insurance fund was created to provide compensation for workers who received injuries as a result of an employment related accident. Ohio Revised Code ("O.R.C.") § 4123.31. BWC was created to administer the fund. O.R.C. § 4121.12. BWC has the power *inter alia* to review and process claim applications, to award compensation and to make payment on uncontested and proper claims. O.R.C. § 4121.39. Its administrator establishes standard medical fees, determines eligibility, and pays for medical, nursing and hospital services from the state insurance fund. O.R.C.§ 4123.66(A).

Rules for the payment of nursing services are set forth in Ohio Administrative Code ("O.A.C.") § 4123-7-25. The injured worker's physician must request caregiver services. This physician must develop a treatment plan and indicate what services should be provided and at what level of care. BWC determines whether these services are medically necessary and related to the worker's allowed claim. The benefit is *per diem* and non-negotiable. There are no taxes or retirement deductions or contributions taken from the benefit.

An injured worker may receive unlicensed, unskilled caregiver services from either an independent attendant or a caregiver spouse or family member. O.A.C. § 4123-7-25. Caregiver services include assistance with bathing or eating, placing a bed pan, dressing or moving, or assistance with personal hygiene. Duties such as maintaining a household, washing clothes, preparing meals or running errands are not reimbursable caregiver services. O.A.C. § 4123-7-25(F).

Mrs. Salyer provides nonskilled caregiver services to her husband, Auburn Salyer, at his request. These services include assisting her husband to dress; giving him his medication; helping him shower; and assisting him with mobility. Mrs. Salyer does not utilize any of BWC's facilities to care for her husband. Mrs. Salyer does not work under a job description provided by BWC; nor is she evaluated by BWC. Mr. Salyer, not BWC, exercises control over the hiring and firing of the caregiver.

REASONS FOR DENYING THE WRIT

I. FEDERAL COURTS LACK JURISDICTION TO HEAR THIS CASE.

Mrs. Salyer's Petition should be denied because she lacks jurisdiction to bring her FLSA claim in light of this Court's recent ruling in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). Legislation passed pursuant to the Commerce Clause which creates a private cause of action against a state in federal court (like the FLSA) is an improper abrogation of a state's sovereign immunity and is barred by the Eleventh Amendment, unless the state has consented to be sued. *Id.*

Ohio has not waived its sovereign immunity. This may only be done by the state constitution or legislature. *See, Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299, 305-07 (1990). In fact, Ohio has set forth an equivalent state "FLSA" in O.R.C. § 4111 in order to determine wage and overtime disputes in its own courts.

Since *Seminole*, numerous district courts have dismissed FLSA claims against states for lack of jurisdiction. *See, e.g, Close v. New York*, No. 94-CV-0906 (N.D. N.Y. Aug. 19, 1996); *Blow v. Kansas*, 929 F. Supp 1400 (D. Kan. June 24, 1996); *Adams v. Kansas*, No. 94-4201-RDR (D. Kan. June 24, 1996); *Moad v. Arkansas State Police Dept.*, No. LR-C-94-450 (E.D. Ark. May 14, 1996); *Stuhr v. Oregon*, No. 95-6118-TC (D. Ore. 1996); *Mills v. Maine*, No. 92-410-P-H (D. Me. July 3, 1996); *Goebel v. Colorado*, No. 3-K-1227 (D. Col. June 25, 1996); *Ross v. Middle Tennessee State Univ.*, No. 3-95-1202 (M.D. Tenn. July 17, 1996.) This court should do likewise here.

II. THERE IS NO LOWER-COURT SPLIT OF AUTHORITY ON THE ISSUES PRESENTED.

In her petition, Mrs. Salyer fails to raise a single issue that has divided the lower federal courts. Contrary to her contention, *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) is distinguishable. In *Bonnette*, the state selected and hired the in-home caregiver, not the injured worker. Here, Mr. Salyer selected his spouse as the caregiver. Moreover, the Sixth Circuit Court of Appeals never ruled on the question of whether Mrs. Salyer was employed by BWC because it found that even if she was so employed, the companionship services exemption to the FLSA applied, which disposed of the case. Under these circumstances, this case does not warrant the exercise of the Court's discretionary jurisdiction. *See* Sup Ct. R. 10.

III. THERE ARE NO SUBSTANTIAL QUESTIONS OF FEDERAL IMPORTANCE DUE TO THE CASE'S UNIQUE FACTS AND LIMITED APPLICABILITY TO OTHER POTENTIAL PLAINTIFFS.

Spousal caregiving funded by a workers' compensation fund is a limited practice in Ohio (which may be phased out in the near future) and other states. It is a unique program which enables spouses to care for an injured worker should the couple choose. It is not a general practice throughout the United States. Currently in Ohio, an injured worker, if eligible, has a choice of receiving care from a spouse, immediate family member or an independent caregiving agency. Few workers choose to have their spouse act in the caregiving capacity and even fewer spouses agree to perform this service when the care can be provided by an independent agency and the spouse can seek gainful employment. Due to the limited number of parties affected by the decision below,

it is not a substantial question of federal importance. Accordingly, the Court's discretionary jurisdiction should not be exercised.

IV. THE LOWER COURTS CORRECTLY HELD THAT THE FLSA DOES NOT APPLY TO SPOUSAL CAREGIVER SERVICES.

In addition to the above considerations for denying the writ, the lower courts correctly decided the merits of the case.

A. UNDER THE ECONOMIC REALITIES TEST, MRS. SALYER IS NOT BWC'S EMPLOYEE.

The determination of whether an individual is to be considered an employee is a factual one which is made from a consideration of the "total employment situation and the economic realities of the work relationship." *Goldberg v. Whitaker House Corp.*, 366 U.S. 28, 33 (1961); *Bonnette v. California Health & Welfare Agency*, 704 F. 2d 1465 (9th Cir. 1983). In determining whether an employer-employee relationship exists in the context of FLSA, several factors are reviewed including whether the employer:

> (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. (citations omitted.)

Bonnette, 525 F. Supp. 125, 135 (N.D. Cal. 1981.)

Other non-exclusive factors have been considered, including:

* * *

> factors, derived from *United States v. Silk*, 331 U.S. 704, 91 L. Ed. 157, 67 S.Ct. 1463 (1947) (Social Security Act), and known as the "economic reality test," includ[ing]: (1) the degree of control exercised by the employers over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. (citations omitted.)

Brock v. Superior Care, Inc., 840 F. 2d 1054, 1058 (2nd Cir. 1988). A review of the factors in *Bonnette* and *Brock* reveal that BWC does not 'suffer or permit' Mrs. Salyer to work.

BWC does not have the power to hire or fire Mrs. Salyer as Mr. Salyer's caregiver. As explained above, Mr. Salyer's physician submits applications for payment of caregiver services to BWC. The physician, not BWC, develops a treatment plan and indicates what types of services should be provided to Mr. Salyer and at what level of care.

When payment for caregiver services is approved, Mr. Salyer may hire an independent health care attendant or may arrange for his spouse or other family member to perform these duties. Mr. Salyer retains the right to hire or to terminate the services of the caregiver he chooses. As the

district court correctly noted, this is in stark contrast to *Bonnette v. California Health and Welfare Agency*, *infra*, where workers were hired directly by the state agency.

BWC does not track Mrs. Salyer's work hours. Instead, Mrs. Salyer is paid a flat *per diem* benefit. O.R.C. § 4121.12.1(P) (3), O.A.C. §§ 4123-7-38 and 4123-7-40 provide that BWC may review the services provided by Mrs. Salyer only to insure that the bills presented for service were actually rendered, and medically necessary. BWC has never instructed or trained Mrs. Salyer regarding her caregiver services or provided her with a job description.

BWC's payments to Mrs. Salyer are essentially insurance benefits to Mr. Salyer. *Cf. Savage v. Correlated Health Services, Ltd.*, (1992) 64 Ohio St. 42 3d, 591 N.E.2d 1216 (1992) (Workers' Compensation Benefits constitute "insurance" under O.R.C. § 2305.27 and do not reduce medical malpractice damages). Although Mrs. Salyer is paid directly by BWC, these payments are benefits which are provided to Mr. Salyer arising from his status as an injured worker under the Ohio workers' compensation laws. No legal relationship by contract or otherwise arises from the direct payment of these funds. O.A.C. § 4123-7-30 (A).

BWC maintains no separate employment information on Mrs. Salyer. Such information is maintained in Mr. Salyer's claim file and contains only records of the benefit payments. Mrs. Salyer is not a civil service employee and receives no vacation, sick leave, or personal leave. BWC does not deduct taxes or retirement payments from the payments made to Mrs. Salyer.

Mrs. Salyer's opportunity for profit is tied directly to the physical condition of her husband. If there is a change in Mr. Salyer's condition such that he requires skilled

nursing care, then Mrs. Salyer would not be able to perform these services. Moreover, Mr. Salyer selected Mrs. Salyer to be his caregiver among several alternatives. Mrs. Salyer, in turn, agreed to care for her husband rather than seek outside employment. Either person (not BWC) may decide to terminate this relationship.

It is clear from the statutory framework that BWC is, in essence, a government-managed insurance company. It is not in the business of providing health care services. Rather, it is the function of BWC to provide monetary benefits to injured workers so that they can obtain health care services. O.A.C. § 4123-9-01. Like any private insurance company, BWC monitors the payment of claims to the extent necessary to insure that the claimant is entitled to the benefits dispersed by BWC. Thus, Mrs. Salyer's services to Mr. Salyer do not form an integral part of BWC's business.

B. THE SERVICES MRS. SALYER PROVIDES TO MR. SALYER ARE COMPANIONSHIP SERVICES AND ARE SPECIFICALLY EXCLUDED FROM COVERAGE UNDER THE FLSA.

Pursuant to 29 U.S.C. §213(a)(15), the FLSA contains exclusions of certain employees from minimum wage coverage:

> Any employee * * * employed in domestic service employment to *provide companionship services for individuals who * * * are unable to care for themselves* (as such terms are defined in delineated by regulations of the secretary.)

(emphasis added). *Id.*

The U.S. Department of Labor regulations define companionship services as follows:

> 'companionship services' shall mean those *services which provide fellowship, care, and protection for a person who, because of * * * physical * * * infirmity, cannot care for his or her own needs.* Such services may include household work related to the care of the aged or infirmed person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: [p]rovided, however, that such work is incidental, i.e., does not exceed twenty percent of the total weekly hours worked. The term 'companionship services' *does not include services relating to the care and protection of the aged or infirmed which require and are performed by trained personnel, such as a registered or practical nurse.*

(emphasis added.) 29 CFR § 552.6.

Mrs. Salyer's services to Mr. Salyer clearly qualify as companionship services. She assists with (1) dressing, (2) putting on his shoes, support stockings, and brace, (3) taking his medications, (4) showering, and (5) assisting with his mobility. Although Mrs. Salyer performs other services which may be considered household services, *i.e.*, cleaning the bed, cooking, laundry and shopping, these tasks are specifically excluded for payment by BWC.

Mrs. Salyer performs services much like the companionship services provided in *McCune v. Oregon Senior Services Division*, 643 F. Supp. 1444 (D. Ore. 1986). She provides fellowship, care and protection for Mr. Salyer who has been unable to care for himself since his accident.

See, 29 CFR § 552.6. She received no formal training from BWC on how to perform her duties. She failed to present any evidence that these tasks require trained personnel and therefore, she does not fall within the "trained personnel" exception. *See*, *Cox v. Acme Health Services*, 55 F.3d 1304 (7th Cir. 1995); *Toth v. Green River Regional Mental Health/Mental Retardation Bd., Inc.*, 753 F.Supp. 216 (W.D. Ky. 1989); *Sandt v. Holden*, 698 F.Supp 64 (M.D.Pa. 1988); *McCune v. Oregon Senior Servs. Div.*, 643 F.Supp. 1444 (D.Ore. 1986), *aff'd*, 894 F.2d 1107 (9th Cir. 1990).

Accordingly, Mrs. Salyer's caregiver services fall within the definition of companionship services, and are excluded from the FLSA.

V. CONCLUSION

Respondents respectfully request the Court deny the petition for writ of certiorari in this matter.

Respectfully submitted,
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